No. 87-950

Supreme Court, U.S.
FILED
FEB 16 1988
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

RED LAKE BAND OF CHIPPEWA INDIANS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Arizona v. *Manypenny*, 451 U.S. 232 (1981) 8
Arizona v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983) 3
Iowa Mutual Ins. Co. v. *LaPlante*, No. 85-1589 (Feb. 24, 1987) 5
Kissinger v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980) 4
Lone Wolf v. *Hitchcock*, 187 U.S. 553 (1903) 4
Minneapolis Star & Tribune Co. v. *United States Dep't of Interior*, No. 4-85 Civ. 1255 (D. Minn. 1985) 1
Minnesota v. *United States*, 305 U.S. 382 (1939) 6
National Farmers Union Ins. Co. v. *Crow Tribe of Indians*, 471 U.S. 845 (1985) 3, 5
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978) 4, 7
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 3, 4, 7
Three Affiliated Tribes of the Fort Berthold Reservation v. *Wold Engineering*, 467 U.S. 138 (1984) 5
United States v. *Cherokee Nation*, No. 85-1940 (Mar. 31, 1987) 4
United States v. *Clapox*, 35 F. 575 (D. Or. 1888) 7
United States v. *Mississippi*, 380 U.S. 128 (1965) 2, 4
United States v. *Mottaz*, 476 U.S. 834 (1986) 4
United States v. *Texas*, 143 U.S. 621 (1892) 4
United States v. *United Mine Workers*, 330 U.S. 258 (1947) 6
United States v. *Wheeler*, 435 U.S. 313 (1978) 4
United States v. *White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986) 5, 6
United States v. *Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986), cert. denied, No. 86-1425 (May 26, 1987) ... 5, 6
Washington v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) 3, 4
West Virginia v. *United States*, No. 85-937 (Jan. 13, 1987) 4
Williams v. *Lee*, 358 U.S. 217 (1959) 5, 6
Youakim v. *Miller*, 425 U.S. 231 (1976) 5

Statutes and regulations:	Page
Federal Records Act, 44 U.S.C. (Supp. III) 3106	1, 4
Indian Reorganization Act of 1934, 25 U.S.C. (& Supp. IV) 461-479	3
5 U.S.C. 552	1
25 U.S.C. 2	7, 8
25 U.S.C. 13	8
28 U.S.C. 1345	6
25 C.F.R.:	
Pt. 11	2, 7
Section 11.1(a) (1977)	7
Section 11.1(a) (1986)	7
Section 11.1(a)	7
Section 11.1(a)(6)	2
Section 11.1(b)	7
Section 11.1(d)	3
Section 11.1(e)	8
Section 11.2	7
Section 11.3	7
Section 11.4	7
Section 11.10	2, 8
Section 11.11	2, 8
Section 11.22	7
Section 11.22C	7
Section 11.30 *et seq.*	7
Miscellaneous:	
47 Fed. Reg. 22093 (1982)	2, 7

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-950

RED LAKE BAND OF CHIPPEWA INDIANS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the courts below erred in ordering them to return to the Federal Government the records of a Court of Indian Offenses established by the Bureau of Indian Affairs (BIA).

1. a. The United States brought this action against the Red Lake Band of Chippewa Indians, the Red Lake Tribal Council, and the members of the Council under the Federal Records Act, 44 U.S.C. (Supp. III) 3106 (Pet. App. 24), to recover certain records of the Court of Indian Offenses on the Red Lake Indian Reservation in Minnesota ("Red Lake Court") (*id.* at 3). The Tribe had removed the records to the tribal archives in August 1985 and thereafter refused to return them to the BIA (*ibid.*).[1]

[1] The BIA sought the records after a newspaper sued for access to them under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The district court dismissed the FOIA case without prejudice because BIA did not possess the records. *Minneapolis Star & Tribune Co.* v. *United States Dep't of Interior*, No. 4-85 Civ. 1255 (D. Minn. 1985).

The district court granted the United States' motion for summary judgment (Pet. App. 10-23). The court first rejected the Tribe's claim of sovereign immunity to suit, explaining that the "assertion of jurisdiction over this case does not repudiate the right of Indian tribes to sovereign immunity, but simply recognizes that such sovereign immunity does not work as against the United States" (*id.* at 13). On the merits, the court held that the records of the Red Lake Court belong to the United States because the Red Lake Court was established by the BIA under 25 C.F.R. Pt. 11, and therefore is a "CFR court," not a tribal court (Pet. App. 18-21). The court emphasized that the Tribe itself had taken the position in 1981 that the Red Lake Court is a CFR court and that BIA had expressly included the Red Lake Reservation under the CFR-court regulations in 1982 in response to the Tribe's contention that it had been improperly omitted (*id.* at 19-21, citing 47 Fed. Reg. 22093 (1982)).

b. The court of appeals unanimously affirmed (Pet. App. 2-9). The court found it to be "an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States. * * * * * [J]ust as a state may not assert sovereign immunity as against the federal government, neither may an Indian tribe, as a dependent nation, do so." *Id.* at 6-7, citing *United States* v. *Mississippi,* 380 U.S. 128, 140-141 (1965). On the merits, the court of appeals concluded that because the Red Lake Court is expressly designated by the governing regulations as a CFR court, the Court must comply with the regulations' record-keeping requirements and its records belong to the United States (Pet. App. 7-8, citing 25 C.F.R. 11.1(a)(6), 11.10, 11.11).[2] The court observed

[2] Records of Courts of Indian Offenses are to remain in the BIA's custody for twenty years and are then transferred to the National

that although a CFR court may be reclassified as an independent tribal court and thereby be exempted from, inter alia, the regulations' record-keeping requirements, petitioners failed to establish that the Red Lake Court qualified for that status (Pet. App. 8-9).[3]

c. On December 11, 1987, Justice Blackmun denied petitioners' application for a stay pending certiorari.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review therefore is not warranted.

a. Petitioners' contention (Pet. 15-19) that the Tribe's sovereign immunity insulates it from a suit brought by the United States is without merit. Although Indian Tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers (*Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 60 (1978)), "tribal sovereignty is dependent on, and subordinate to * * * the Federal Government." *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980). As a result, an Indian Tribe possesses only those aspects of sovereignty that have not been withdrawn as a necessary incident of its dependent status (*National Farmers Union Ins. Co.* v. *Crow Tribe of Indians*, 471 U.S. 845, 851-853 (1985)) and are "not 'inconsistent with the overriding interests of the National Government' " (*Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) (quoting *Colville*, 447 U.S.

Archives (Pet. App. 17, citing BIA, Record Disposal Schedule 172, Supp. 3, Release 1 (2/11/77)).

[3] In order to qualify for the exemption, the Tribe was required to establish both that it was organized under the Indian Reorganization Act of 1934, 25 U.S.C. (& Supp. IV) 461-479, and that it had adopted a law-and-order code in accordance with its constitution and bylaws. See Pet. App. 8, citing 25 C.F.R. 11.1(d).

at 153)). Plainly, the ability of the United States to bring suit against persons who have wrongfully appropriated its property is an "overriding interest of the National Government" to which tribal sovereignty must yield. Congress authorized the Attorney General to bring a suit to recover "any" records that have been unlawfully removed from an agency's custody (44 U.S.C. (Supp. III) 3106; *Kissinger* v. *Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 148 (1980)); there is no exception for situations in which the records were unlawfully removed by an Indian Tribe. Compare *United States* v. *Mottaz,* 476 U.S. 834, 851 (1986).

Moreover, as petitioners concede (Pet. 18-19), it is well-settled that even the "States have no sovereign immunity as against the Federal Government" (*West Virginia* v. *United States,* No. 85-937 (Jan. 13, 1987), slip op. 6; see also *United States* v. *Mississippi,* 380 U.S. 128, 140-141 (1965); *United States* v. *Texas,* 143 U.S. 621, 646 (1892)). It follows *a fortiori* that sovereign immunity does not insulate an Indian Tribe from a suit brought by the United States, because Indian Tribes, unlike the States, are "fully subordinated to the sovereignty of the United States" (*Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 211 (1978)) and their sovereign powers are subject to plenary control by the United States. *Santa Clara Pueblo,* 436 U.S. at 56; *United States* v. *Wheeler,* 435 U.S. 313, 323 (1978); *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565 (1903). Compare *United States* v. *Cherokee Nation,* No. 85-1940 (Mar. 31, 1987), slip op. 7. And because the authority of the United States to sue any person (including a State or Tribe) in its own courts is a necessary attribute of federal supremacy, it is immaterial that the Tribe might not have consented to such suits. See Pet. 17-18, 19.

The court of appeals' holding that the Tribe is not immune from a suit brought by the United States is consist-

ent with recent decisions of the Ninth Circuit, the only other court of appeals to consider the question. See *United States* v. *White Mountain Apache Tribe,* 784 F.2d 917, 920 (9th Cir. 1986); *United States* v. *Yakima Tribal Court,* 806 F.2d 853, 861 (9th Cir. 1986), cert. denied, No. 86-1425 (May 26, 1987). The Court denied certiorari in the *Yakima* case raising the same issue, and there is no reason for a different disposition here.

b. Petitioners' related contention (Pet. 9-11) that the district court should have referred this controversy to the Red Lake Court does not warrant review. As petitioners concede (Pet. 11 n.5), they did not raise this issue below, and because the issue is not jurisdictional, this Court need not consider it. *Youakim* v. *Miller,* 425 U.S. 231, 234 (1976). In any event, this contention is wrong. Petitioners rely on *National Farmers Union* and *Iowa Mutual Ins. Co.* v. *LaPlante,* No. 85-1589 (Feb. 24, 1987). However, in those cases, the plaintiffs in federal court also were named as defendants in pending suits in tribal court that arose out of the same facts. Here, by contrast, there was no pending suit in the Red Lake Court to which the federal court could have deferred.

To be sure, even where there is no suit pending in tribal court, this Court has held that state courts ordinarily cannot exercise jurisdiction over suits brought by non-Indians against Indians arising out of on-reservation conduct, because such suits would "infringe[ ] on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee,* 358 U.S. 217, 220 (1959); see also *Iowa Mutual,* slip op. 5; *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering,* 467 U.S. 138, 148 (1984). However, nothing in these decisions or the principles they apply suggests that the *United States* cannot bring an action in *federal* court to enforce its rights

under *federal* law. Compare *United States* v. *United Mine Workers,* 330 U.S. 258, 272-273 (1947). As we have explained above, such access by the United States to its own courts is at least presumptively an attribute of federal sovereignty and supremacy. And Congress in fact has conferred jurisdiction on the district courts over "*all* civil actions, suits or proceedings commenced by the United States" (28 U.S.C. 1345 (emphasis added)), thereby manifesting an intention that the United States have access to its own courts to protect its interests. There is no exception to this grant of jurisdiction for suits brought against Indian Tribes. Cf. *Minnesota* v. *United States,* 305 U.S. 382, 389-390 (1939). Especially where, as here, the United States sues to enforce its rights under a federal statute, the suit does not impermissibly interfere with "the right of reservation Indians to make their own laws and be ruled by them" (*Williams* v. *Lee,* 358 U.S. at 220), because the Indians' right of self-government is subordinate to the sovereign powers of the United States, including the statutes passed by Congress.

The Ninth Circuit recently rejected a similar argument that the United States should be required to exhaust its remedies in tribal court before bringing an action against an Indian Tribe in federal court. See *White Mountain Apache Tribe,* 784 F.2d at 920 n.10; *Yakima Tribal Court,* 806 F.2d at 860-861. As noted above (see page 5, *supra*), the Court denied certiorari in the *Yakima* case, and there is no reason for a different result here, especially because petitioners (unlike the petitioners in *Yakima*) failed to raise the issue below.

c. On the merits, this case raises an issue of first impression concerning the status of records generated by a CFR court. That issue turns on the interpretation of BIA regulations and is of narrow and diminishing importance.

For these reasons, this case plainly does not warrant review on the merits.[4]

In any event, both courts below correctly concluded, on the basis of their thorough review of the governing regulations, that the Red Lake Court is an establishment of the BIA and that its records therefore belong to the BIA. CFR courts, also known as Courts of Indian Offenses, were created by the Federal Government and are entirely governed by the regulations in 25 C.F.R. Pt. 11. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. at 196 n.7. The Commissioner of Indian Affairs authorized the creation of these courts beginning in the 1880's, pursuant to the authority now codified in 25 U.S.C. 2 to promulgate regulations for the management of Indian affairs. *United States* v. *Clapox*, 35 F. 575, 577 (D. Or. 1888). The Red Lake Court was established under that authority in 1884. 47 Fed. Reg. 22093 (1982). The purpose of these courts was and is to fill a vacuum created by the breakdown of traditional tribal mechanisms for the enforcement of tribal law and custom on particular reservations. See 25 C.F.R. 11.1(b); *Santa Clara Pueblo*, 436 U.S. at 64 n.17. The current regulations specify which reservations shall have CFR courts (25 C.F.R. 11.1(a)); govern the appointment and removal of judges (25 C.F.R. 11.3, 11.4); set forth the jurisdiction of the CFR courts (25 C.F.R. 11.2, 11.22, 11.22C) and the substantive law to be applied (25 C.F.R. 11.30 *et seq.*); and require records to be kept of all court

---

[4] Of the 127 court systems currently operating on Indian Reservations, only 22 are CFR courts (see 25 C.F.R. 11.1(a)(1986)), a marked decline from the number of CFR courts a decade earlier (see 25 C.F.R. 11.1(a)(1977)). See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. at 196 n.7. With the approval and encouragement of the Department of the Interior, the remaining CFR courts may eventually begin to operate as traditional tribal courts as well. Thus, issues concerning the ownership of a CFR court's records are of diminishing importance.

proceedings (25 C.F.R. 11.10, 11.11). The BIA funds the CFR courts through annual appropriations from Congress (25 U.S.C. 13).

Contrary to petitioners' contention (Pet. 13-15), the mere fact that the Red Lake Court now applies a law-and-order code adopted by the Tribe as its substantive criminal code does not make the Court itself any less an arm of the BIA—just as the fact that a federal district court might apply the law of a State or foreign country as the substantive rule of decision in a particular case does not make the court any less a part of the United States Government in that case. See, *e.g.*, *Arizona* v. *Manypenny*, 451 U.S. 232, 241 (1981). Indeed, as petitioners appear to acknowledge (Pet. 3), the CFR-court regulations required BIA's approval before the Tribe's law-and-order code could be applied in the Red Lake Court. See 25 C.F.R. 11.1(e). Accordingly, although the substantive law applied in criminal cases involving Indians on the Red Lake Reservation is the product of the Tribe's inherent power to legislate over its own affairs, the power to adjudicate is separately conferred on the Red Lake Court by federal law, through 25 U.S.C. 2 and the CFR-court regulations. For this reason, the Red Lake Court is an arm of the BIA, and the courts below correctly held that the Court's records belong to and must be returned to the BIA.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60296